STATE OF MICHIGAN

COURT OF APPEALS

LARRY RIDNER,

Plaintiff-Appellant,

v

CHARLEY RAFKO TOWNE and CAROL SUE TOWNE,

Defendants-Appellees.

UNPUBLISHED
October 28, 2003

No. 240710
Monroe Circuit Court
LC No. 99-010343-NI

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right from a judgment on jury verdict awarding him $13,500 upon a finding that he was seventy percent at fault. Plaintiff had brought suit seeking damages for injuries sustained in an automobile accident. We affirm.

Plaintiff first argues that the trial court committed error mandating reversal when it denied his motion for a directed verdict on the question of liability. We disagree.

A trial court's decision on a motion for a directed verdict is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124,131; 666 NW2d 186 (2003). This Court reviews all of the evidence presented up to the time of the motion to determine whether a question of fact existed. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). In so doing, this Court views the evidence in the light most favorable to the nonmoving party, grants him every reasonable inference, and resolves any conflict in the evidence in his favor. *Id.* Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact finder's responsibility to determine the credibility and weight of the testimony. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). If reasonable jurors could honestly reach a different conclusion, this Court may not substitute its judgment for that of the jury. *Id.*

Here, plaintiff introduced evidence suggesting that defendant was solely liable for the accident that gave rise to this suit. Plaintiff described how he looked before leaving the driveway of the gas station and saw only one vehicle approximately one block away, that he then turned out into the right lane and traversed the short distance to the driveway of his business, that he

turned his turn signal on and braked before turning into the business' driveway, that while turning he was unexpectedly hit from behind by a fast moving car and that the impact forced his truck 20 to 25 feet up into the driveway.

On the other hand, defendant presented evidence that, while he was in fact at least partly to blame for the accident, plaintiff, too, was at fault. Defendant testified that just as he passed into the intersection near the gas station from which plaintiff was leaving, plaintiff, driving very slowly, pulled out directly in front of him, that plaintiff started to move into the left lane, that defendant then attempted to pass plaintiff on the right, and that plaintiff then suddenly braked and turned right into the insurance agency's parking lot, passing across the right lane in which defendant was traveling, thereby causing the collision.

Both parties' testimony, however, contained major discrepancies. Plaintiff, while initially testifying that his vehicle never crossed over the line into the left lane, subsequently admitted that it was possible that he may have veered partway into the left lane before making his turn. This admission supported defendant's assertion that plaintiff turned into the left lane from the gas station but then turned across the right lane, where defendant was traveling, to enter the agency's driveway. In his trial testimony, defendant, stated that the traffic signal at the corner bordering the gas station was green when he reached it, so he did not have to stop. Later he admitted that at his deposition he had testified that the light was red and that he had had to stop at the light. This change in his testimony at trial undermined his credibility. Moreover, while asserting at trial that he actually observed plaintiff pull out of the gas station in front of him, defendant subsequently admitted that when deposed, he had said he did not see plaintiff pull out of the driveway. He admitted that he was told that this is what had happened by one of his passengers in the truck that day. This concession not only further undermined defendant's credibility, but also suggested that defendant may simply not have been paying proper attention to the road. Defendant further admitted that he did not recall if plaintiff used his turn signal before starting to turn into the agency's parking lot and agreed that the accident would not have occurred had he left more space between his and plaintiff's vehicle. But defendant also claimed that the accident would not have happened had plaintiff not turned right from the left lane, and insisted that it was plaintiff who determined the distance between the vehicles by pulling out directly in front of him.

Viewing this evidence in the light most favorable to defendant, the nonmoving party, granting defendant every reasonable inference, resolving any conflicts in defendant's favor, and bearing in mind that it is the province of the factfinder to determine witness credibility, we believe that reasonable jurors could honestly have reached different conclusions on the question of liability. Accordingly, we find that the trial court did not commit error mandating reversal when it denied plaintiff's motion for a directed verdict.

Plaintiff next argues that the trial court erred when it permitted defendants to argue to the jury the substantive content of Dr. Judge's report and when it gave the report to the jury during deliberations or, in the alternative, that defense counsel's actions in substantively using the challenged evidence in his closing argument constituted reversible error. Again, we disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). An abuse of discretion is found only if an unprejudiced

person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

When reviewing whether an attorney's comments are improper, this Court first determines whether the attorney's action was improper and, if it was, whether we must reverse. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996), citing *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Id.* Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. *Id.*, citing *Hammack v Lutheran Social Services*, 211 Mich App 1, 9; 535 NW2d 215 (1995).

Looking first to the admissibility of the challenged portion of Dr. Judge's report, MRE 801(c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 802 provides that hearsay evidence is inadmissible unless it comes within an established exception to MRE 801(c). The medical record introduced here contains two levels of hearsay: (1) the record itself, and (2) plaintiff's statements contained within that record. So, admission of the disputed portion of Dr. Judge's report contains hearsay within hearsay. To be admissible, each part of the combined statement must fall within an exception to the hearsay rule. MRE 805; *Cooley v Ford Motor Co*, 175 Mich App 199, 203; 437 NW2d 638 (1988).

Plaintiff does not challenge that the medical report itself was admissible, agreeing that Dr. Judge's report was admissible under MRE 803(6), which provides an exception to the hearsay rule for records of regularly conducted business activities. Rather, plaintiff challenges only the admissibility of plaintiff's statements contained within Dr. Judge's report, arguing that plaintiff's statements were not admissible under any exception to the hearsay rule.

Plaintiff is correct: his statements in the report are not admissible under MRE 803(4) which provides that "statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause of the external source thereof insofar as reasonably necessary to such diagnosis and treatment" are admissible as an exception to the hearsay rule. In the present case, however, plaintiff's statements to Dr. Judge were not made for purposes of medical treatment or medical diagnosis in connection with treatment because plaintiff saw Dr. Judge merely for an independent medical examination. Accordingly, the statements attributed to plaintiff and contained within Dr. Judge's report are not admissible under MRE 803(4).

It is also true, as plaintiff has argued, that the disputed portion of Dr. Judge's report was not admissible under MRE 801(d)(2)(A). That rule provides that a statement that is offered against a party and is the party's own statement, in either an individual or a representative capacity, and is not made in connection with a guilty plea to a misdemeanor motor vehicle

violation or an admission of responsibility for a civil infraction, is not hearsay and, therefore, is admissible. But, in order for a statement to be admissible under this rule, obviously, the party-opponent must have made the statement. *Merrow v Bofferding*, 458 Mich 617, 633, fn 14; 581 NW2d 696 (1998). Here, the only evidence presented to show that plaintiff actually made the disputed statements was the fact that the statements appear in the medical report itself and are attributed to plaintiff. Dr. Judge was not deposed, nor did he appear at trial. Under the circumstances, particularly in light of the fact that plaintiff vehemently denied having made the statements in Dr. Judge's report, we find that the challenged portion of the report was not admissible under MRE 801(d)(2)(A).

Nonetheless, we find that the challenged statements in Dr. Judge's report were admissible for impeachment under MRE 613(b). This rule provides that extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness. Plaintiff argued that his alleged statements to Dr. Judge were not admissible under this rule because defendant failed to establish that plaintiff actually made the statements. MRE 613(b) does not require that a party seeking to introduce evidence under the rule prove that the witness actually made the statement. The rule requires only that the witness be afforded an opportunity to explain or deny the statement and that the opposite party be afforded an opportunity to interrogate the witness. Both of these requirements were met. Accordingly, we find that the trial court did not abuse its discretion when it permitted Dr. Judge's report to be admitted into evidence because the report itself was admissible under MRE 803(6), and the statements within the report were admissible under MRE 613(b).

Such is not the case, however, with regard to defense counsel's substantive use of plaintiff's statements in his closing argument. MRE 613 by its very nature is intended to be used only to impeach a witness' credibility. As our Supreme Court has explained, a previous inconsistent statement of a witness, admissible to impeach credibility, is not regarded as an exception to the hearsay rule because it is not offered as substantive evidence to prove the truth of the statement, but only to prove that the witness in fact made the statement. *Merrow*, at 631, citing *People v Rodgers*, 388 Mich 513; 201 NW2d 621 (1972). Yet in this case, defense counsel clearly made substantive use of the statements admitted under MRE 613(b). Instead of merely impeaching plaintiff, he argued that plaintiff's statements negated defendant as the proximate cause of plaintiff's neck and back injuries. This argument violated the rules of evidence and improperly invited the jury to reduce plaintiff's damages by injecting a false issue into the case. This Court has ruled that the injection of an issue not proper to a case either through the pleadings or the evidence is reversible error. *Morrison v Skeels*, 16 Mich App 727, 735; 168 NW2d 644 (1969). Thus, it appears that defense counsel committed reversible error.

But we note that both the Michigan Court Rules and case law provide that "an error in anything done or omitted by a court or a party may not be used as a ground for disturbing an order unless a refusal to do so is inconsistent with substantial justice." MCR 2.613(A); *Detroit v Volunteers of America*, 169 Mich App 465, 472-473; 426 NW2d 743 (1988). We believe that defense counsel's error in improperly arguing the substantive content of the statements plaintiff purportedly made to Dr. Judge in his report was essentially harmless. After all, if the jury accepted this argument, it would have been impossible for the jury to find that plaintiff suffered

injury and that defendant proximately caused this injury. Yet, on both of these questions the jury found in plaintiff's favor. Because a refusal to reverse the verdict in this case is not inconsistent with substantial justice, we find that the error complained of was not such as to require reversal.

Finally, plaintiff argues that the trial court erred in giving SJI2d 12.02 over plaintiff's objection. We once again disagree.

On appeal, claims of instructional error are reviewed de novo. *Cox v Flint Bd of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). But, a trial court's determination whether a standard instruction was applicable and accurate is reviewed for an abuse of discretion, *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002), and its determination whether an instruction is supported by the evidence is entitled to deference, *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). An abuse of discretion exists only if an unprejudiced person considering the facts on which the trial court acted would conclude that there was no justification or excuse for the ruling made. *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 151; 640 NW2d 892 (2002). Moreover, reversal is not required unless the failure to do so would be inconsistent with substantial justice. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

This Court has held that for M Civ JI 12.02 to be warranted, the excuse must be an adequate one under the facts and circumstances of the case. *Jackson v Coeling*, 133 Mich App 394, 397; 349 NW2d 517 (1984). This Court further has held that a condition cannot be an excuse for violating a statute when that statute specifically requires a driver to take that condition into account in obeying it. *Id.* at 399.

Here, we find that the trial court did not abuse its discretion when it found M Civ JI 12.02 to be applicable. As discussed above, despite plaintiff's assertions to the contrary, conflicting evidence was presented as to which party was liable for the accident that gave rise to this case. There was evidence that suggested either that defendant failed to travel at a speed and distance behind plaintiff's vehicle such as would allow him to stop within the assured clear distance ahead, thus violating MCL 257.627, or that plaintiff breached his duty to yield the right of way when entering onto the highway in question, thus violating MCL 257.652. This conflicting evidence left questions for the jury as to which of the parties caused the accident, and as to which, if any, statute had been violated and by whom. Similarly, evidence was introduced that could suggest either that defendant violated MCL 257.643(1), which provides that a driver not pass a vehicle on the right unless conditions permit the overtaking and passing of that in safety, or that plaintiff violated MCL 257.642, which provides that a vehicle be driven as nearly as practicable within a single lane. If plaintiff failed to yield the right of way to defendant and pulled out directly in front of him, or if plaintiff veered into the left lane and then turned back across the right lane to make his turn into the insurance agency's driveway, then clearly a jury could find that defendant used ordinary care but was still unable to avoid the violation. Under the circumstances, we believe that the trial court did not abuse its discretion when it determined that M Civ JI 12.02 applied, because an unprejudiced person, considering the facts on which the

trial court acted, would not conclude that there was no justification or excuse for the ruling made. Accordingly, plaintiff is not entitled to reversal on these grounds.

We affirm.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey